

WRITTEN STATEMENT

OF

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ON BEHALF OF

VISA INC.

BEFORE THE

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INTELLECUTAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY

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Chairman Berman, Ranking Member Coble, and Members of the Subcommittee, my name is Mark MacCarthy and I am Senior Vice President for Global Public Policy for Visa Inc. Thank you for the opportunity to testify today on the important issue of international intellectual property protection.

Visa operates a global electronic payments network and is a widely recognized consumer brand. Visa facilitates global commerce through the transfer of value and information among financial institutions, merchants, consumers, businesses and government entities in more than 170 countries and territories worldwide.

Visa Inc. is a global company headquartered in San Francisco, California. The company's operating regions include: Asia-Pacific; Canada; Central and Eastern Europe, Middle East and Africa; Latin America and the Caribbean; and USA. Visa Europe is a separate and independent legal entity that is an exclusive licensee of Visa Inc.'s trademarks and technology in the European region.

Visa provides its financial institution clients with a broad range of platforms for consumer credit, debit, prepaid and commercial payments. Visa's network and payment platforms deliver significant value to our clients and their customers in terms of greater efficiency, security, convenience and global reach. Visa Inc. does not issue cards, set cardholder fees or interest rates or arrange for merchant acceptance of Visa cards. These relationships are managed by our network of more than 16,000 financial institution clients worldwide.

Our financial institution clients reported that, as of March 31, 2007, they had issued more than 1.4 billion cards carrying our brands. And, according to our financial institution clients, these cards were accepted at more than 27 million merchant outlets and

one million ATMs, and the total payments and cash volume on these cards during the twelve months ended March 31, 2007 was more than \$3.3 trillion.

Electronic commerce is an important channel of commerce for Visa. Worldwide, excluding Europe, electronic commerce accounted for 9% of our total sales volume in 2006. In the U.S. electronic commerce was 12% of our total sales volume in 2006, up from 11% in 2005. Cross region transactions where the merchant is in one country and the customer is in another are also significant. For example, 4% of Visa sales for U.S. based electronic commerce merchants come from abroad.

To promote growth in this channel of commerce, to protect the Visa brand and because it is the right thing to do, Visa goes beyond any legal requirements to prevent the use of its payment system for illegal electronic commerce transactions. Visa policy is unequivocal and clear: our system should not be used for illegal transactions.

We work cooperatively with law enforcement in the United States and around the world to aid their law enforcement efforts. We take special steps in cases of criminal activity and activity that threatens health and safety. For example, we search the Internet for merchants selling or advertising child pornography or illegally distributing controlled substances and expel them from our system as soon as they are discovered. We work cooperatively with law enforcement, other payment brands and the National Center for Missing and Exploited Children in the Financial Coalition Against Child Pornography to share information and take collaborative steps against child pornography merchants.

We work with the Secret Service, the FBI, the Federal Trade Commission, and state Attorneys General to assist their efforts to stop fraud, identity theft, and data breaches. We have worked with the Department of Justice and State Attorneys General

to respond to their concerns about illegal online tobacco merchants. Finally, in response to Congressional concerns regarding illegal Internet gambling we devised a coding and blocking scheme that prevents US cardholders from engaging in illegal Internet gambling while also allowing offshore gambling merchants to provide service to cardholders in jurisdictions where Internet gambling is legal.

The subject of today's hearing is different. It relates to complaints by third-party business entities that some Internet merchants, typically located outside of the United States, are violating their intellectual property rights. For example, music companies have a business model that is under attack from illegal download sites, and counterfeiters and pirates violate the trademark rights of other companies.

Visa is not a law enforcement agency and cannot police the Internet for all possible violations of third-party intellectual property rights. The volume is too great and Visa is able to address only the clearest violations of these rights. So the way forward in international intellectual property protection is fundamentally a matter for the affected countries and territories to deal with through judicial and law enforcement co-operation.

Visa does have in place policies and procedures to handle these third-party business complaints, but we do not use a coding and blocking scheme analogous to the one we use for Internet gambling. This is so for several reasons. First, our codes are for business activity, not legal status. For example, music download sites can use an appropriate merchant category code, but this code doesn't distinguish between legal ones and illegal ones. Second, Internet gambling merchants and sites involving intellectual property protection are subject to different legal regimes around the world. Internet gambling seems to be illegal in the United States, but legal in many other jurisdictions.

So it makes sense from a system perspective to let legal Internet gambling merchants introduce these transactions into the Visa network as long as they are properly coded as gambling transactions and have the financial institutions where the transactions are illegal block them. On the other hand, Internet merchants that are involved in intellectual property infringement are typically violating the laws of most countries. So the best way for Visa to respond to complaints involving infringement is not to require the infringing merchant to code the transaction properly, but to prevent that entity from entering the infringing transactions into the system, or to restrict its ability to enter transactions into the system to those few jurisdictions where the transaction might be legal.

The Visa process for handling third-party business complaints starts when a business entity approaches us with clear, documented evidence of illegal electronic commerce activity, and adequately identifies the infringing, usually foreign, Internet merchant. They provide us with substantiation that an electronic commerce activity is illegal and furnish documentation that Visa cards are used for this illegal activity. Normally, these complaints are not of criminal activity and do not involve health and safety issues. But they do pose a business problem to these companies and we do attempt to respond, especially in what appear to be large magnitude cases, although we are not legally required to do so.

Our response involves an assessment of legality. This is made easier if there has been a regulatory or judicial decision that establishes the illegality, but this is usually not the case. If the buyer and seller are in the same legal jurisdiction, the assessment can be relatively straightforward. But we do not receive many complaints when the transaction is domestic, within one jurisdiction. Companies tend to pursue effective domestic

remedies in these cases. Most complaints are cross-border, involving the merchant in one location and the customer in another. If the legal situation in both countries is the same, the assessment of legality can be relatively uncomplicated. But what if the merchant is in one jurisdiction, the customer is in another and the laws are not the same?

After wrestling with these issues, Visa developed a policy for cross-border transactions: if a transaction would be illegal in either the jurisdiction of the merchant or the jurisdiction of the cardholder, we don't want that transaction.

If Visa determines that the type of transaction is illegal in either jurisdiction, we do what we reasonably can to assist the complaining IP or other rights holder. This task is complicated by our corporate structure. Since Visa does not work directly with merchants, we need to locate the bank that has the merchant account. In the case of an offshore merchant, this will involve working closely with regional Visa Inc. officials or officials at the separate entity, Visa Europe, who have responsibility for that bank. Once we provide the complaint to the bank involved, that usually resolves the issue. In most cases, the bank does not want the business and terminates the merchant or takes other action to bring the merchant into compliance with our policy. If the transaction is illegal and the bank does not take action, we can take further enforcement action against the bank.

In some cases, however, the merchant resists our enforcement efforts, insists on the legality of the underlying activity and goes to court in the local jurisdiction to vindicate what it perceives to be its rights under local law. This is what took place in the case involving Allofmp3.com and Alltunes.com

In this case, Visa officials received a documented complaint by IFPI (the International Federation of the Phonographic Industry), which represents copyright owners based in more than 70 countries, that Allofmp3.com, a website located in Russia, was infringing on the copyrights of their members by allowing downloads of music without having obtained the authorization of the copyright owners. We conducted an assessment of the legal situation, including a review by outside counsel, and concluded that under local Russian law and under the laws of the vast majority of the merchant's consumers – located primarily in the United States and Great Britain – the merchant's transactions were illegal. In this context, Visa determined that generally we did not want any illegal music download sites in our system. We were thereby able to extend enforcement against this one site to different sites or to the same site processed by a different bank. After appropriate notice, the Russian bank working with Allofmp3.com stopped processing its Visa transactions in the summer of 2006. At the end of September 2006, the bank also stopped processing Visa transactions from an affiliated music downloading site called Alltunes.com.

The owner of Alltunes.com sued the bank in a Russian court (Visa was a third party in this litigation on the bank's side) and in June 2007 won a judgment that the bank was in violation of their contract with the merchant and would have to continue to provide processing services. In response to the bank's claim that the merchant was acting illegally and so in violation of Visa rules, the court determined that there were no court rulings in Russia establishing that Alltunes.com was making illegal use of exclusive rights belonging to some right holders.

In August 2007, a Russian court issued a ruling related to a criminal copyright infringement case initiated by IFPI against the owner of Allofmp3.com, which stated that there had not been sufficient confirmation of any illegal activity by the owner of Allofmp3.com. Even though the copyright owners had not given permission to Allofmp3.com, Alltunes.com and similar sites to sell copies of their music, a Russian collective rights society was deemed to be operating legitimately under Russian law. The court implied that Allofmp3.com and similar sites would be in compliance with Russian law to the extent that they paid for rights from a Russian collective rights society. This ruling thereby suggested that these sites might be legal in Russia.

The problem is that at the moment the Russian law contains apparently conflicting provisions regarding the rights of collective rights societies. On the one hand, the law clearly states that participation in a collective society is voluntary for the right holders. A collective right society acts based on the authorities granted by right holders. On the other hand, the law also states that a collective rights society may issue licenses and collect royalties on behalf of right holders even without their permission.

These court cases created a challenge for Visa. We had responded to a documented complaint of copyright infringement, but the local courts ordered our local client bank to continue to provide service. Yet these transactions would still be illegal under the laws in virtually every other country in the world. To preserve our policy of not allowing transactions in our system that would be illegal in either the jurisdiction of the cardholder or the jurisdiction of the merchant, Visa decided to allow the local Russian bank to provide only domestic service to the particular Russian download site involved in

the court case. International transactions from customers in other countries would not be allowed.

We think this policy adequately responds to the complicated legal situation in this case. But what lessons can we learn from this case in regard to the issues of international infringement?

First, Visa has policies and procedures in place to deal with international infringement issues. We respond to documented complaints from third parties in this area. We have adopted a global policy to resolve difficulties that arise in cross-border jurisdiction circumstances: if a transaction would be illegal in either jurisdiction, it should not be in our system.

Second, the Allofmp3.com and Alltunes.com case illustrates the limits of private sector enforcement efforts in cases of international infringement. Visa can only make decisions --and ask its affiliated banks to take corrective action -- when the underlying law and legal violation is reasonably clear. In this situation, it appeared reasonably clear to our local bank, to us and to the record companies that Russian law did not allow the activities of Allofmp3.com and Alltunes.com. But a local court thought otherwise. As a result, Visa's client bank was exposed to legal liability for withdrawing service to merchants found to be operating properly within local law. We are simply not in a position to clarify unclear local law or to override it. .

In some cases our systems can accommodate conflicting local laws. In the case of Internet gambling, which appears to be illegal in the United States, but seems to be legal in large parts of the rest of the world, we were able to devise a coding and blocking scheme which allowed issuing banks to block transactions where they appeared to be

illegal. In the Allofmp3.com and Alltunes.com case, the activity appears to be legal in Russia, but appears to be illegal just about everywhere else. In this case, we are able to block international transactions before they enter the Visa system for authorization outside Russia. But what about a more complicated case between these extremes, where the laws of many countries conflict with the laws of the rest? There are clearly system limitations restricting our ability to block illegal transactions in these circumstances, since we potentially would have to deal with the combinations of the legal regimes in the 170 countries and territories where we operate.

And this leads to my third and final point, when local laws are not clear or are not consistent, governments and aggrieved businesses cannot put private sector intermediaries like Visa in the position of resolving the conflicts and lack of clarity. Ultimately resolving these issues requires government-to-government discussions that harmonize local legal structures. It is only within these harmonized legal structures, that private enforcement efforts such as Visa's can fully succeed.